

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 10 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

V.

JORGE A. IBARRA-HERNANDEZ,

Defendant - Appellant.

No. 05-30321

D.C. No. CR-04-00402-2-TSZ

MEMORANDUM^{*}

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Submitted March 8, 2006^{**}
Seattle, Washington

Before: O'SCANNLAIN, SILVERMAN, and GOULD, Circuit Judges.

Jorge Ibarra-Hernandez appeals his sentence for his guilty-plea conviction
for conspiracy to distribute cocaine and possession of cocaine with intent to

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

distribute in violation of 21 U.S.C. §§ 841(a), 841(b)(1)(B) and 846. We have jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. We review for clear error the district court's factual finding that a defendant is ineligible for safety-valve relief, *United States v. Washman*, 128 F.3d 1305, 1307 (9th Cir. 1997), and affirm.

Ibarra-Hernandez has the burden of proving by a preponderance of the evidence that he is eligible for safety-valve relief. *United States v. Diaz-Cardenas*, 351 F.3d 404, 409 (9th Cir. 2003). If he establishes eligibility, the government may rebut the showing with evidence that the information is untrue or incomplete. *Id.* We have already rejected Ibarra-Hernandez's argument that facts allowing a decreased sentence below the statutory minimum must be found beyond a reasonable doubt. *See United States v. Labrada-Bustamante*, 428 F.3d 1252, 1263 (9th Cir. 2005).

Ibarra-Hernandez argues that the district court clearly erred by finding that he failed to establish under 18 U.S.C. § 3553(f)(5) that he truthfully provided all of the information he had regarding the offense. However, Ibarra-Hernandez's testimony at sentencing was inconsistent with previously admitted facts that formed the basis of his plea, law enforcement officers' observations of the crime, and co-defendant admissions. Therefore, the district court did not clearly err in

finding Ibarra-Hernandez ineligible for safety-valve relief. In addition, the district judge made it clear that he would impose a 60-month sentence even if the mandatory minimum did not apply.

AFFIRMED.